183

(5)

Supreme Court, U.S.
FILED
MAR 3 - 2011
OFFICE OF THE CLERK

No. 10-980

In the Supreme Court of the United States

EVAN GRIFFITH,

Petitioner,

v.

DAVE REDNOUR, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LORI R. MASON
Counsel of Record
BENJAMIN G. DAMSTEDT
ELIZABETH L. STAMESHKIN
DANA J. MOSS
COOLEY LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 843-5000
lmason@cooley.com

Counsel for *Amicus Curiae*
The Innocence Network

March 3, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C · 800 890 5001

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. The Court Should Grant Certiorari to Resolve the Circuit Conflict. 4

A. The circuits have issued conflicting decisions on whether the actual innocence gateway applies to AEDPA's statute of limitations. . 4

1. The Sixth and Tenth Circuits apply the actual innocence gateway to AEDPA's statute of limitations. 4

2. The First, Fifth, Seventh, and Eighth Circuits refuse to apply the actual innocence gateway to AEDPA's statute of limitations. 6

3. The remaining circuits have left the question open. 7

B. The circuit conflict results in innocent habeas petitioners being treated differently based merely on location. 9

II. Preserving the Actual Innocence Gateway Presents a Critical Issue of Federal Law Requiring This Court's Review. 10

A. This Court's precedent supports applying the actual innocence gateway to cure procedural defaults. 10

B. The arguments previously raised against the actual innocence gateway are unpersuasive. 15

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE(S)

CASES

Araujo v. Chandler,
435 F.3d 678 (7th Cir. 2005) 7

Coleman v. Thompson,
501 U.S. 722 (1991) 5, 6

Cousin v. Lensing,
310 F.3d 843 (5th Cir. 2002) 6

David v. Hall,
318 F.3d 343 (1st Cir. 2003) 6

Doe v. Menefee,
391 F.3d 147 (2d Cir. 2004) 7

Engle v. Isaac,
456 U.S. 107 (1982) 15

Escamilla v. Jungwirth,
426 F.3d 868 (7th Cir. 2005) 6

Flanders v. Graves,
299 F.3d 974 (8th Cir. 2002) 7

Herrera v. Collins,
506 U.S. 390 (1993) 12, 13

Holland v. Florida,
130 S. Ct. 2549 (2010) 2, 3, 13, 15

House v. Bell,
547 U.S. 518 (2006) ..... *passim*

House v. Bell,
No. 3:96-cv-883, 2007 WL 4568444 (E.D. Tenn. Dec. 20, 2007) 15

Johnson v. Fla. Dep't of Corr.,
513 F.3d 1328 (11th Cir. 2008) 8

Kuhlmann v. Wilson,
477 U.S. 436 (1986) 11, 12

LaCava v. Kyler,
398 F.3d 271 (3d Cir. 2005) 7

Lee v. Lampert,
610 F.3d 1125 (9th Cir. 2010) 8, 17

Lonchar v. Thomas,
517 U.S. 314 (1996) 11, 16

Lopez v. Trani,
628 F.3d 1228 (10th Cir. 2010) 5, 6

Majoy v. Roe,
296 F.3d 770 (9th Cir. 2002) 8

McCleskey v. Zant,
499 U.S. 467 (1991) 12

Murray v. Carrier,
477 U.S. 478 (1986) ..... *passim*

Preiser v. Rodriguez,
411 U.S. 475 (1973) 11

Schlup v. Delo,
513 U.S. 298 (1995) . . . . . *passim*

Sharpe v. Bell,
593 F.3d 372 (4th Cir. 2010) 7

Souter v. Jones,
395 F.3d 577 (6th Cir. 2005) . . . . . *passim*

Souter v. Jones,
No. 02-cv-00067 (W.D. Mich. Oct. 11, 2005) . 10

United States v. Montano,
398 F.3d 1276 (11th Cir. 2005) 16

STATUTES

28 U.S.C. § 2244(d)(1) . . . . . *passim*
28 U.S.C. § 2254(b)-(c) 16
28 U.S.C. § 2255 16

LEGISLATIVE HISTORY

H.R. Rep. No. 104-518 (1996), *reprinted in* 1996
U.S.C.C.A.N. 944 17

141 Cong. Rec. 15016 (1995) 17

RULES

Sup. Ct. R. 37.2 1
Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Bob Barr, *Death Penalty Disgrace*, N.Y. Times, June 1, 2009 17

Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev. 237 (1995) . . . 17

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) 12

Nancy King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* 58 (2007), available at http://www.ncjrs.gov/ pdffiles1/ nij/grants/219559.pdf 16, 18

Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. Rev. L. & Soc. Change 451 (1990-1991) 18

Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. Cal. L. Rev. 2507 (1993) 17

U.S. Dep't of Justice Bureau of Justice Statistics, *Education and Correctional Populations* (2003), available at http://bjs.ojp.usdoj.gov/ content/pub/pdf/ecp.pdf 19

U.S. Dep't of Justice Bureau of Justice Statistics, *Medical Problems of Prisoners* (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/mpp.pdf 18

Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101 (2002) 11, 19

INTEREST OF *AMICUS CURIAE*

The Innocence Network (the "Network") is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners whose actual innocence may be proved through post-conviction evidence. The Network and its members are dedicated to improving the reliability of the criminal justice system and preventing wrongful convictions by researching their causes and pursuing legislative and administrative reforms to enhance the truth-seeking functions of the criminal justice system. The scores of members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[1]

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari presents a question of exceptional importance on which the circuits are sharply divided: whether the actual innocence gateway applies to the statute of limitations in 28 U.S.C. § 2244(d)(1) for first habeas petitions.

---

[1] Pursuant to Supreme Court Rule 37 2, *amicus curiae* certifies that the counsel of record for all parties received 10-days timely notice of *amicus curiae*'s intent to file an *amicus curiae* brief, and all parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. No person other than *amicus curiae*, its members, or its counsel have made such a monetary contribution

Under this Court's precedent, a showing of actual innocence allows a petitioner "to avoid a procedural bar to the consideration of the merits" of his habeas claims. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). This showing is often referred to as the "actual innocence gateway," because it acts as "a gateway through which a habeas petitioner must pass" but does not itself entitle the petitioner to habeas relief. *Id.* at 315 (internal quotation omitted). The procedural bar at issue in this case is the federal statute of limitations for first habeas petitions enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The statute recites a one-year deadline for filing a first habeas petition from four distinct "events that trigger its running," such as the date on which the underlying judgment became final. *Holland v. Florida*, 130 S. Ct. 2549, 2561 (2010) (emphasis omitted).

The Seventh Circuit here—and the First, Fifth, and Eighth Circuits—have refused to apply this Court's actual innocence gateway to AEDPA's statute of limitations. These circuits have adopted an unduly narrow reading of AEDPA, asserting that because section 2244(d)(1) does not explicitly mention the gateway, the gateway cannot apply. In these circuits, unless the petitioner is entitled to equitable tolling, filing a first federal habeas petition even one day outside AEDPA's one-year period requires dismissal, regardless of the strength of a petitioner's actual innocence showing.

By contrast, the Sixth and Tenth Circuits correctly hold that Congress did not displace this Court's actual innocence gateway *sub silentio* by enacting AEDPA. The gateway arises from a line of cases well-

established before AEDPA, such as *Murray v. Carrier*[2] and *Schlup v. Delo*,[3] which support the proposition that procedural defaults may be set aside if a miscarriage of justice would result. As this Court recently held, "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland*, 130 S. Ct. at 2560 (internal quotation omitted). Here, Congress enacted the statute of limitations for first habeas petitions against the backdrop of the Court's actual innocence jurisprudence and did not provide any command—let alone a clear command—disallowing the use of the actual innocence gateway.

Indeed, this Court has recognized that the actual innocence gateway continues to govern where it was not clearly displaced by AEDPA. In *House v. Bell*, the state cited two AEDPA provisions that increased the standard of proof to clear and convincing evidence for actual innocence assertions in limited circumstances, such as second or successive petitions. 547 U.S. 518, 539 (2006). The state argued that these provisions implied that Congress intended to displace the *Schlup* preponderance standard for actual innocence assertions in all circumstances. *Id.* This Court rejected the argument, holding that "the standard of

---

[2] 477 U.S. 478, 496 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default . . . .").

[3] 513 U.S. at 326-27 (holding that the actual innocence gateway requires only a showing that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence").

review in these provisions is inapplicable," because "[n]either provision addresses the type of petition here—a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." *Id.* at 539. Similarly here, AEDPA's specific mention of actual innocence showings for second and successive positions does not imply congressional intent to eliminate the gateway entirely for first habeas petitions.

This Court should act to resolve the circuit conflict and hold that the actual innocence gateway may remedy a time bar under AEDPA's statute of limitations for first habeas petitions. Accordingly, the Innocence Network respectfully requests that the Court grant the petition for a writ of certiorari.

ARGUMENT

I. The Court Should Grant Certiorari to Resolve the Circuit Conflict.

A. The circuits have issued conflicting decisions on whether the actual innocence gateway applies to AEDPA's statute of limitations.

1. The Sixth and Tenth Circuits apply the actual innocence gateway to AEDPA's statute of limitations.

The circuit courts have issued conflicting decisions on the actual innocence question presented here, and the split continues to widen. In 2005, the Sixth Circuit decided *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005). After concluding that the petitioner had made the

"rare and extraordinary" showing of actual innocence, the court considered whether Souter's innocence showing made any difference under the law. *Id.* at 590, 597-602. The court correctly determined that, when AEDPA was passed, "Congress was working against the jurisprudential background of *Murray v. Carrier* and *Schlup v. Delo*, in which the Supreme Court held that a showing of actual innocence . . . was sufficient to overcome a procedurally-defaulted habeas petition." *Id.* at 598. Indeed, not only had this Court applied the gateway to procedural defaults generally, but it had also specifically "established that a procedural default resulting from an *untimely filing* could be excused." *Id.* at 599 (emphasis added) (citing *Carrier*, 477 U.S. at 496; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). "[P]resum[ing] that Congress legislates against the background of existing jurisprudence unless it specifically negates that jurisprudence," the Sixth Circuit concluded that the actual innocence gateway also applies to the procedural time-bar for first habeas petitions under AEDPA. *Souter*, 395 F.3d at 597-602.[4]

The Tenth Circuit also recently confirmed that the actual innocence gateway applies to AEDPA's statute of limitations. In *Lopez v. Trani*, the court held that "a sufficiently supported claim of actual innocence creates an exception to procedural barriers for bringing

---

[4] In reaching its holding, the *Souter* court also addressed other issues, including the applicability of equitable tolling, the more stringent requirements imposed by AEDPA for actual innocence showings for second and successive petitions, the gateway's impact on the section 2244(d)(1)(D) trigger, and the constitutional concerns that would arise if the actual innocence gateway was not recognized *Souter*, 395 F.3d at 597-602.

constitutional claims, regardless of whether the petitioner demonstrated cause for the failure to bring these claims forward earlier." 628 F.3d 1228, 1230-31 (10th Cir. 2010). Like the Sixth Circuit, the Tenth Circuit based its holding on this Court's *Schlup*, *Carrier*, and *Coleman* decisions. *Id.*

2. The First, Fifth, Seventh, and Eighth Circuits refuse to apply the actual innocence gateway to AEDPA's statute of limitations.

In the petitioner's case, the Seventh Circuit followed its prior precedent in holding that the actual innocence gateway does not apply to AEDPA's statute of limitations. (App 18a (citing *Escamilla v. Jungwirth*, 426 F.3d 868 (7th Cir. 2005).) In *Escamilla*, the Seventh Circuit narrowly read AEDPA, concluding that the gateway did not apply to the statute of limitations, because it was not expressly listed as one of the section 2244(d)(1) triggers. *See* 426 F.3d at 871-72. The *Escamilla* opinion does not cite this Court's *Schlup*, *Murray*, or *Coleman* decisions.

Several other circuits have also refused to apply the actual innocence gateway to AEDPA's statute of limitations. In *David v. Hall*, the First Circuit held that "the statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence." 318 F.3d 343, 347 (1st Cir. 2003). Likewise, in *Cousin v. Lensing*, the Fifth Circuit rejected a gateway argument, holding that "§ 2244(d) contains no explicit exemption for petitioners claiming actual innocence," and actual innocence is not a form of equitable tolling. 310 F.3d 843, 849 (5th Cir. 2002) (emphasis omitted). In

Flanders v. Graves, the Eighth Circuit rejected the gateway on the grounds that "[t]he statute fixes a one-year period of limitations, and says nothing about actual innocence." 299 F.3d 974, 977 (8th Cir. 2002).[5]

3. The remaining circuits have left the question open.

Although the legal issue presented by this petition has also been argued to the remaining circuits, those circuits have declined to reach the issue based on judicial restraint. For example, in *Doe v. Menefee*, the Second Circuit recognized that "[b]ecause the interests that must be balanced in creating an exception to the statute of limitations are identical to those implicated in the procedural default context, we see no reason not to apply the *Schlup* standard in the tolling context." 391 F.3d 147, 161 (2d Cir. 2004). The court, however, declined to address the legal question, because the petitioner did not meet the evidentiary threshold for the *Schlup* standard. *Id.* at 172-74. The Third and Fourth Circuits have likewise reserved this issue for later decision. *See LaCava v. Kyler*, 398 F.3d 271, 274 n.3 (3d Cir. 2005); *Sharpe v. Bell*, 593 F.3d 372, 377

---

[5] The *Flanders* court, however, declined to hold that actual innocence could never support an equitable tolling claim, holding instead that a petitioner "would have to show some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations." *Flanders*, 299 F.3d at 978. The Seventh Circuit similarly acknowledged that equitable tolling may be proper where the petitioner diligently pursued his claim of actual innocence. *Araujo v. Chandler*, 435 F.3d 678, 681 (7th Cir. 2005)

n.1 (4th Cir. 2010). Similarly, the Eleventh Circuit has "avoided this constitutional issue" on several occasions because "no time-barred petitioner has made the requisite actual-innocence showing." *Johnson v. Fla. Dep't of Corr.*, 513 F.3d 1328, 1333-34 (11th Cir. 2008).

The Ninth Circuit had also previously declined to address the legal question presented here. *E.g.*, *Majoy v. Roe*, 296 F.3d 770, 776-77 (9th Cir. 2002) (noting that disregarding the miscarriage-of-justice exception would raise serious constitutional questions but not deciding the issue). In late 2010, a panel concluded that the gateway did not apply to AEDPA because it was not specifically listed among the AEDPA triggers. *Lee v. Lampert*, 610 F.3d 1125, 1128-30 (9th Cir. 2010). On February 8, 2011, however, the *Lee* panel decision was vacated, and en banc rehearing was ordered. Oral argument in the en banc rehearing is currently scheduled for March 23, 2011.

* * * * *

A circuit conflict hangs over the question presented in this case. Some circuits permit a petitioner to use the actual innocence gateway to excuse an AEDPA statute-of-limitations procedural default, other circuits forbid the use of the gateway, and the remaining circuits have deliberately left the question open. As recognized by the dissent to the decision denying rehearing below, "*that question . . . is now ripe for Supreme Court resolution*." (App 12a (Hamilton, J., dissenting) (emphasis added).)

B. The circuit conflict results in innocent habeas petitioners being treated differently based merely on location.

As a result of this circuit conflict, the fate of actually innocent prisoners irrationally and unfairly turns on geographic location. The facts of the Sixth Circuit's *Souter* case provide a stark example of the need to resolve the circuit conflict by uniformly applying the actual innocence gateway nationwide.

The petitioner, Larry Pat Souter, attended a party on August 25, 1979. *Souter*, 395 F.3d at 581. Most of the people at the party were drinking heavily, including Souter, who was drinking "Canadian Club whiskey out of a pint-sized bottle." *Id.* One of the partygoers left the party to walk home but, soon after leaving, was found by a roadside 900 feet away, unconscious and lying in a small pool of blood. She died later that morning. "Once word reached the party that [the victim] had been hit, Souter and the rest of the partygoers made their way to the location of the body . . . . On his walk there, Souter discarded the bottle on the side of the road." *Id.* Souter was the last person to see the victim conscious, having been "amorous" with her just before she left the house. *Id.*

Souter was prosecuted for murder twelve years after the victim's death. The prosecution's evidence consisted primarily of Souter's discarded bottle and expert testimony that the bottle previously had a sharp edge that could have been used to kill the victim. Souter was convicted. *Id.* at 581-83.

Souter later filed a habeas petition. He provided extensive evidence of his actual innocence, including

an expert witness's recantation of trial testimony and newly discovered photos from the crime scene showing blood stains inconsistent with the prosecution's theory. *Id.* at 583-84. Souter, however, failed to file his petition within one year of discovering the new evidence on which he based his petition. *Id.* at 588.

Overturning the district court's dismissal of the petition, the Sixth Circuit held that Souter "presented new evidence which raises sufficient doubt about his guilt and undermines confidence in the result of his trial," and that he "should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims." *Id.* at 597, 602.

After serving 13 years in prison, Souter was exonerated on remand and released from state prison. *See Souter v. Jones*, No. 02-cv-00067 (W.D. Mich. Oct. 11, 2005). If, however, by chance, Souter had been imprisoned in a circuit that does not recognize the actual innocence gateway, he would have remained in prison.

II. Preserving the Actual Innocence Gateway Presents a Critical Issue of Federal Law Requiring This Court's Review.

A. This Court's precedent supports applying the actual innocence gateway to cure procedural defaults.

In addition to the circuit conflict, Griffith's petition for a writ of certiorari also warrants this Court's review because it presents an issue of critical importance. The Seventh Circuit construed the § 2244(d) statute of limitations so narrowly that an

actually innocent person who files a habeas petition even one day after the one-year limitations period may remain incarcerated or even be executed. The court based this decision largely on the lack of an explicit mention of the actual innocence gateway in the text of § 2244(d) itself. But such a construction is inconsistent with the equitable nature of a writ of habeas corpus, unsupported by evidence that Congress intended to deprive courts of their equitable discretion, and contrary to this Court's decisions including *Schlup* and *House*.

Considerations of fundamental fairness have long governed the writ's vital role in preventing unjust incarceration. *See, e.g.*, *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) ("[H]abeas corpus has traditionally been regarded as governed by equitable principles.") (internal quotation omitted). The availability of habeas corpus to secure relief from wrongful confinement was "an integral part of our common-law heritage" by the time the Colonies achieved independence. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973); *see also Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) ("Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."); *Schlup*, 513 U.S. at 325 ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."); Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute of Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101, 2138 (2002) ("[E]ven those gravely concerned about conservation of judicial resources have acknowledged that 'the policy

against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation.'") (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970)).

Modern Supreme Court precedent has continued to ensure "the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (citation omitted). In *Carrier*, for example, the Court held that to avoid a "miscarriage of justice," "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for [state law] procedural default." 477 U.S. at 495-96. The same day, the Court "conclude[d] that the 'ends of justice' require federal courts to entertain [successive habeas] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann*, 477 U.S. at 454. Similarly, in *McCleskey v. Zant*, the Court provided an innocence safety valve for the cause-and-prejudice standard, explaining: "The miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty . . . ." 499 U.S. 467, 495 (1991) (citation omitted).

In *Schlup v. Delo*—which was decided before AEDPA—the Court continued to develop its innocence jurisprudence. 513 U.S. at 319 ("[H]abeas corpus is, at its core, an equitable remedy."). *Schlup* held that a showing of actual innocence may excuse procedural

errors where equity so demands, describing an actual innocence showing as "'a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Id.* at 315 (quoting *Herrera*, 506 U.S. at 404).

Although aware of *Schlup* when enacting AEDPA, Congress did not preclude the application of the actual innocence gateway to time-related defaults, and its silence should not be construed as a rejection of the equitable principles traditionally governing the writ. *See Holland*, 130 S. Ct. at 2560 (courts may not "construe a statute to displace courts' traditional equitable authority absent the 'clearest command'") (internal quotation omitted). Nor did Congress prohibit use of the courts' equitable authority to excuse a procedural default when faced with a strong actual innocence showing. *See Souter*, 395 F.3d at 597-98.

The *House* decision—which issued long after AEDPA's passage—emphasizes the actual innocence gateway's continuing vitality. The petitioner, Paul Gregory House, was convicted of murder and sentenced to death, with the "central forensic proof connecting House to the crime" being blood and semen evidence. 547 U.S. at 544. House prosecuted several state and federal habeas petitions disputing the reliability of the blood and semen evidence with evidence that became available post-conviction. His petitions were denied, in part, because he had waived his arguments under state law. *Id.* at 534-35. The Supreme Court held that, although federal habeas relief is generally not available for "claims forfeited under state law," "the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration" in extraordinary

circumstances. *Id.* at 536 (internal quotation omitted). The actual innocence gateway provides the "specific rule to implement this general principle." *Id.*

Most importantly here, *House* considered and rejected the argument that AEDPA superseded the *Schlup* actual innocence gateway. The state argued that AEDPA's imposition of a clear-and-convincing standard of proof in two specific subsections "replaced" the *Schlup* more-likely-than-not standard for all other procedural defaults. *Id.* at 539-40. The Court disagreed, concluding that the two cited subsections—the very provisions cited by the Seventh Circuit and other circuits—were inapposite outside their limited purview:

> One AEDPA provision establishes a [clear-and-convincing evidence] standard for second or successive petitions involving no retroactively applicable new law, 28 U.S.C. § 2244(b)(2)(B)(ii); another sets it as a threshold for obtaining an evidentiary hearing on claims the petitioner failed to develop in state court, § 2254(e)(2). ***Neither provision addresses the type of petition at issue here–a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence.*** Thus, the standard of review in these provisions is inapplicable.

Id. (emphasis added).

The reasoning of *House* applies with equal force here. Just as Congress expressed no intent to change the standard of proof for actual innocence gateway claims outside the scope of the two specific

subsections, Congress expressed no intent to eliminate the gateway for procedural bars not covered by those subsections. Nothing in AEDPA meets the "clearest command" standard required to displace the courts' traditional equitable authority for habeas petitions. *Holland*, 130 S. Ct. at 2560.

House also provides strong evidence of the need for the gateway. On remand, House's conviction and sentence were vacated, and the State did not pursue a new trial against him. *House v. Bell*, No. 3:96-cv-883, 2007 WL 4568444, at *1 (E.D. Tenn. Dec. 20, 2007). Had this Court not applied the actual innocence gateway to cure procedurally defaulted constitutional claims, an innocent man would have been executed.

B. The arguments previously raised against the actual innocence gateway are unpersuasive.

In addition to textual arguments, the circuits that have rejected the application of the actual innocence gateway have raised various policy concerns. None of these concerns justifies rejecting the gateway to AEDPA's statute of limitations for first habeas petitions.

First, the circuits have argued that comity and finality interests counsel against applying the actual innocence gateway. This Court, however, has repeatedly recognized that "principles of comity and finality . . . 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *House*, 547 U.S. at 536 (citing *Carrier*, 477 U.S. at 495) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

Moreover, this case addresses a *federal* procedural requirement for *first* habeas petitions and thus raises far less serious comity and finality concerns than other cases in which this Court has already recognized the gateway. Here, the issue involves a federal procedural requirement: the statute of limitations applicable to federal habeas petitions submitted by state prisoners.[6] 28 U.S.C. § 2244(d)(1). Because the statute of limitations is a federal procedural requirement, it presents far less significant comity concerns than cases in which the Court has applied the innocence gateway to disregard state-law procedural defaults.[7] *See, e.g.*, *House*, 547 U.S. at 536-39. Likewise, as recognized in *Lonchar*, a first federal habeas petition puts less strain on comity and finality interests, in part because successive petitions "are less likely to lead to the discovery of unconstitutional punishments." 517 U.S. at 324.[8]

---

[6] The actual innocence gateway does not absolve a prisoner of exhausting state remedies. 28 U.S.C. § 2254(b)-(c) Rather, the gateway provides an avenue for an innocent state prisoner to seek equitable relief in a federal court when that relief would otherwise be time-barred by a federal statute

[7] This concern with preventing miscarriages of justice is not unique to § 2244. In *United States v. Montano*, the Eleventh Circuit held that an actual innocence showing "serves . . . to lift the procedural bar caused by [the movant's] failure timely to file his § 2255 motion." 398 F.3d 1276, 1284 (11th Cir 2005) (citations omitted).

[8] The small number of state prisoners that file habeas petitions, and even smaller number of petitions ultimately granted, further ameliorate any comity concerns. *E.g.*, Nancy King et al , *Final Technical Report: Habeas Litigation in U S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*

Second, the circuits have pointed to snippets of legislative history, such as a house report stating that AEDPA was intended "to curb the abuse of the statutory writ of habeas corpus." *E.g.*, H.R. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944. Such generalized statements, however, provide no basis to infer congressional intent to preclude the courts' longstanding equitable discretion. As a former member of the House recently stated: "nothing in the statute should have left the courts with the impression that they were barred from hearing claims of actual innocence . . . ." Bob Barr, *Death Penalty Disgrace*, N.Y. Times, June 1, 2009, at A21; *cf.* 141 Cong. Rec. 15016, at 15042 (1995) (statement of Senator Orrin Hatch: discussing successive petitions, "Any time somebody can show innocence, we allow that.").

Finally, some decisions have posited that a state prisoner could discover facts establishing actual innocence and then strategically "hold them until he felt the time was right." *Lee*, 610 F.3d at 1130 n.4. Expecting that prisoners will abuse the actual innocence gateway by purposely delaying habeas petitions is unrealistic for a variety of reasons.

---

58 (2007), available at http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (district courts granted less than 1% of state prisoner habeas petitions); *see also* Victor E Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev 237, 259 (1995) (federal courts typically grant less than 1% of habeas petitions), Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. Cal. L. Rev. 2507, 2523-24 (1993) (according to 1970s data, less than 1% of state prisoners file habeas petitions, and less than 4% of petitions are granted)

The vast majority of late filings likely result from the petitioner's lack of counsel. Only a small number of prisoners have access to counsel when filing their first habeas petitions: 95% of petitioners proceed pro se in non-capital cases, and almost 90% of petitioners proceed pro se in capital cases.[9] In non-capital cases that have been deemed time-barred, only 5% of the claims were made with the assistance of counsel.[10] These statistics show that only a small fraction of prisoners have access to counsel and that access to counsel dramatically decreases the likelihood that a prisoner will file after AEDPA's one-year period. Moreover, the limited availability of counsel when petitioners first file will not increase because the Court recognizes an actual innocence exception to otherwise procedurally defaulted claims. Prisoners will continue to proceed pro se without the know-how to abuse an exception to the statute of limitations.

In addition, prisoners are much more likely than the general population to suffer from mental or learning disabilities or simply to have a low IQ.[11] According to government statistics, 23% of state inmates report having a learning impairment.[12]

---

[9] King, *supra*, at 23

[10] *Id.* at 46

[11] *See* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. Rev. L. & Soc. Change 451, 481-84 (1990-1991).

[12] U.S. Dep't of Justice Bureau of Justice Statistics, *Medical Problems of Prisoners*, 1, 12 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/mpp.pdf.

Inmates also tend to be relatively uneducated. A Department of Justice study revealed that 68% of state inmates did not receive a high school diploma, and less than 12% had any postsecondary education.[13]

No evidence suggests that inmates holding evidence of actual innocence deliberately spend additional time in prison by delaying their petitions for strategic reasons.[14] The freedom of an innocent prisoner far outweighs any potential strategic benefit.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Innocence Network respectfully requests that the Court grant the petition for a writ of certiorari.

---

[13] U.S Dep't of Justice Bureau of Justice Statistics, *Education and Correctional Populations*, 1 (2003), available at http //bjs.ojp.usdoj.gov/content/pub/pdf/ecp pdf.

[14] *See* Zheng, *supra*, at 2131 (non-death-row inmate has no motive to delay filing a habeas petition)

Respectfully Submitted,

LORI R. MASON
Counsel of Record
BENJAMIN G. DAMSTEDT
ELIZABETH L. STAMESHKIN
DANA J. MOSS
COOLEY LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 843-5000
lmason@cooley.com

Counsel for *Amicus Curiae*
The Innocence Network

March 3, 2011